IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-101

BARBARA BLUM, Individually and as Commissioner of the New York State Department of Social Services, and PHILIP L. TOIA,

Petitioners,

against

JOANNE SWIFT, Individually and on behalf of her minor daughter, MICHELLE SWIFT, and on behalf of all other persons similarly situated,

Respondents,

LYLIA ROE, Individually and on behalf of her minor children, CAROL ROE and CHERYL ROE,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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I

The validity of petitioners' actions in the specific factual situation presented by the named respondents was the only issue decided by the courts below and is the only issue presented for review.

Respondents do not address the issues raised in the Petition for a Writ of Certiorari, which are limited to the

validity of petitioners' actions in regard to self-maintaining children whose mothers receive support payments or other resources on their behalf. The decision of the court below is likewise concerned solely with petitioners' application of these support payments and resources (3a),* as is the factual record.

Respondents argue a broader issue. They contend that because the certified class also includes self-maintaining adults who do not receive support payments, the issue for review is the alleged (albeit undemonstrated) pro-ration of the AFDC grants of the hypothetical recipients with whom these adults allegedly reside. Brief in Opposition, pp. 5-6. Respondents ignore the practical and legal consequences that arise from two different factual situations: 1) the receipt of support income by an AFDC parent on behalf of her non-recipient child; and 2) the receipt of income by a self-maintaining non-recipient adult, who may or may not apply his income to the household's shared costs. Moreover, as respondents only fit within the first situation, they cannot represent the hypothetical recipients who allegedly fall into the second. *Sosna* v. *Iowa,* 419 U.S. 393, 403 (1975); *Hall* v. *Beals,* 396 U.S. 45, 48-49 (1969); *Bailey* v. *Patterson,* 369 U.S. 31, 32-33 (1962).

Respondents do not answer petitioners' argument that *Van Lare* v. *Hurley,* 421 U.S. 338 (1975), does not address the first situation described above. See pp. 7-9 of the Petition. Neither *Van Lare* nor the other federal cases cited on pp. 10-11, 12-15, and 18-19 of the Brief in Opposition discuss the validity, under federal regulations, of prorating AFDC grants when the AFDC parent in *fact receives and has control over support resources* which are sufficient to meet the per capita needs of her non-recipient child.

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* References followed by the letter "a" refer to the Appendix to the Petition for a Writ of Certiorari.

Respondents' single attempt to demonstrate that the pro-ration of their own grants (as opposed to the grants of hypothetical recipients who live with self-maintaining adults) violates *Van Lare* only supports petitioners' argument. See Brief in Opposition, pp. 16-17. As respondents recognize, pro-ration of AFDC grants when a non-recipient's per capita share is not available to the recipients (the *Van Lare* situation) will result in insufficient funds to meet the recipients' per capita needs, and will cause the type of hardships which were factually demonstrated by the recipients in *Van Lare.* However, on the facts, respondents are unable to show that their pro-rated AFDC grants were insufficient to meet their per capita needs. They cannot rely on the speculations of the district court judge regarding future hypothetical harm which could possibly occur on different facts.*

II

The policy held invalid by the courts below is in compliance with State law.

Respondents err in their contention that the State courts have prohibited the application of the economies of scale in the determination of AFDC need when, as here, an amount sufficient to meet the needs of the non-recipient is in fact available. Brief in Opposition pp. 11, 20-22. *Snow-*

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* Not only are those speculations addressed solely to the situation where the support resources are provided in-kind (Roe's situation) and not to the situation where they are provided as money (Swift's situation), they are also ill-founded considering the nature of the support provided for the benefit of Roe's non-recipient child, i.e.: shelter, and anything the child needs, including such shared items as a washing machine and freezer. District Court Opinion, n. 8 (15a). It is no wonder that Roe was unable to demonstrate the hardship which would arise if the per capita needs of herself and her two recipient children were not in fact met by her pro-rated grant.

berger v. *Toia,* 60 A.D. 2d 783, 400 N.Y.S. 2d 648 (4th Dept. 1977), *affd.* 46 N.Y. 2d 803, 386 N.E. 2d 833, 413 N.Y.S. 2d 922 (1978), simply stated that New York Social Services Law § 131-a(3) and 18 N.Y.C.R.R. § 352.30(a) only permit the number of persons applying for or receiving assistance to be counted in determining the statutory size of the public assistance household. *Nelson* v. *Toia,* 92 Misc. 2d 575, 400 N.Y.S. 2d 427 (Sup. Ct. Chautauqua Co.), *affd.* 60 A.D. 2d 796 (4th Dept. 1977), *mot. for lv. to app. den.* 44 N.Y. 2d 646 (1978) held only that 18 N.Y.C.R.R. § 352.2(b) required the exclusion of non-recipients from the determination of the size of a public assistance household.*

The determination of household size is only the first step in determining need. The second step is the deduction of available resources from the State-determined need of a household of the relevant size. New York Social Services Law § 131-a(3). Neither of the cited State decisions prohibit the State from recognizing the savings which accrue from the economies of scale at the second step. In *Padilla* v. *Wyman,* 34 N.Y.2d 36, *app. dism. for failure to state a substantial federal question* 419 U.S. 1084 (1974), the New York Court of Appeals in fact rejected a challenge to the use of the economies of scale, stating that that concept:

> " . . . involves no attribution of the contribution of any one member of the household to the maintenance

* New York Social Services Law § 131-a(3) and 18 N.Y.C.R.R. §§ 352.30(a) and 352.2(b) refer only to the determination of the "basic needs" component of the public assistance grant. They do not affect the computation of the shelter allowance. *Snowberger* also involved a second issue—the application of the amount of the non-recipient mother's Social Security payments which exceeded her needs to reduce the needs of her AFDC child. The Court held that this violated the regulation governing the application of Social Security payments, 20 C.F.R. 404.1603, as that regulation had been interpreted in *Johnson* v. *Harder,* 512 F. 2d 1118 (2d Cir.), *cert. den.* 423 U.S. 876 (1975). This issue is not present in the case at bar.

> of any other member . . . Each contributes his own share to the *reduced pooled costs.*" *Id.,* at 40. (emphasis supplied)

Moreover, this Court recognized, in *Dandridge* v. *Williams,* 397 U.S. 471 (1970), that the purpose of AFDC is to help *families,* and the amount of aid provided must be computed on the basis of the needs of the family unit as a whole. *Id.* at 479.*

Petitioners have changed their administrative procedure of determining need in order to comport with the two-step requirement of § 131-a(3). On March 30, 1979, the New York State Department of Social Services repealed 18 N.Y.C.R.R. §§ 352.30(a) and 352.2, the sections relied on in *Snowberger* v. *Toia, supra,* and *Nelson* v. *Toia, supra,* respectively, and added a new § 352.30(a).** Under this new regulation, household size is determined only by the number of persons applying for or receiving assistance. The savings resulting from the economies of scale when a non-recipient whose income is available to meet his own per capita share of the expenses resides in the dwelling unit is treated as a "resource" to be deducted from the need of the applicants and recipients. When the amount of this "resource" is calculated under the method prescribed by this regulation, the resulting need of respondent Swift is still equal to the need of two-thirds of a house-

* Although the per capita needs of respondents' non-recipient children are met by those children's absent fathers, those children are still "dependent" within the definition thereof in 42 U.S.C. § 606(a).

** A copy of the filing of March 30, 1979, which was made pursuant to New York Administrative Procedure Act § 202(2)(c), is reproduced in Appendix "A" to this brief. The filing also amended 18 N.Y.C.R.R. §§ 352.11, and 352.31.

hold of three, and the need of respondent Roe is still three-fourths of a household of four.*

Genin v. *Toia,* 47 N.Y. 2d 959 (1979), cited on p. 21 of the Brief in Opposition, does not involve an interpretation of State law, as respondents contend. It is solely concerned with the application of a child's Title II Social Security benefits under the federal regulations governing that program, as construed in *Johnson* v. *Harder, supra.* That issue is not present here. Moreover, insofar as *Genin* requires the State to determine the need of a caretaker relative as separate and distinct from that of her dependant child, it conflicts with the "family unit" concept recognized in *Dandridge, supra,* and provides further evidence that this Court's intervention is urgently needed. *See Quern* v. *Mandley,* 436 U.S. 725, 733-734 (1978).

The series of cases cited on pp. 21-22 of the Brief in Opposition are consistent with petitioners' position. In each of the cited cases, the non-recipient (an applicant for or former recipient of public assistance) had no income due to his failure to comply with a requirement of the AFDC or Home Relief program. In contrast, the named respondents receive sufficient income for the explicit purpose of meeting the per capita share of their non-recipient children.

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* I.e.: The basic needs of a household of two (Swift's AFDC household) is $150, and the per capita need of a household of two is thus $75. The basic needs of a household of three (Swift's AFDC household plus her non-recipient child with income available to meet his own per capita needs) is $200, and the per capita need of a household of three is thus $66.66. The "resource" provided by the economies of scale to respondent Swift equals the difference between the per capita needs of a household of two and the per capita needs of a household of three, $75.00—$66.66 = $8.34, multiplied by the number of recipients in Swift's AFDC household (Swift and Michelle), $8.34 x 2 = $16.68. When this resource is subtracted from the basic needs of Swift's AFDC household of two, the resulting amount is equal to two-thirds of the needs of a household of three: $150—$16.68 = $133.32; two-thirds of $200 = $133.32.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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September 21, 1979

Respectfully submitted,

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